A

HO MIN CHOO & ANOR v. JUTAMO SDN BHD

HIGH COURT MALAYA, IPOH
HAYATUL AKMAL ABDUL AZIZ JC
[CIVIL SUIT NO: 22NCVC-118-10-2015]
5 DECEMBER 2016

B

CONTRACT: *Agreement – Breach – Sale and purchase agreement – Purchase of property – Allegation that developer failed to deliver vacant possession – Housing project abandoned and stopped for several years but later revived through intervention of third party – Developers delivered vacant possession after revival of housing project – Purchasers sought declaratory reliefs against developer nine years from date of delivery of vacant possession was to have taken place – Whether vacant possession delivered/deemed to be delivered – Whether purchasers slept on their rights by not initiating claim sooner – Whether declaratory reliefs ought to be allowed*

C

CIVIL PROCEDURE: *Pleadings – General damages – Claim by purchasers against developer for breach of sale and purchase agreement – Purchasers sought for general damages – Whether statement of claim disclosed evidence that sale and purchase agreement terminated or repudiated – Whether claim for general damages erroneously claimed – Whether claim ought to be allowed*

D

EVIDENCE: *Adverse inference – Evidence Act 1950, s. 114(g) – Claim by purchasers against developer for breach of sale and purchase agreement – Purchasers opted not to give evidence on oath in court and relied mainly on bundles of document – Whether documents had probative value and admissible – Whether damage and/or losses suffered substantiated – Whether s. 114(g) of Evidence Act 1950 could be invoked to draw adverse inference against purchasers*

E

F

LAND LAW: *Vacant possession – Delivery – Failure of developer to deliver vacant possession – Claim by purchasers against developer for breach of sale and purchase agreement – Housing project abandoned and stopped for several years – Project revived by intervention of third party – Developers delivered vacant possession after revival of housing project – Whether purchasers could refuse vacant possession delivered to them – Whether vacant possession delivered/deemed to be delivered*

G

The plaintiffs and the defendant entered into a sale and purchase agreement ('the SPA') for the sale of a piece of land with a house erected on it ('the house'). The defendant failed to deliver vacant possession of the house within 24 months as required in the SPA. The housing project had stopped for several years and could be regarded as an abandoned project but was revived with an intervention by a third party approved by the Ministry of Housing and Local Government. The plaintiffs filed a writ of summons and statement of claim against the defendant, approximately nine years from the date of the delivery of vacant possession was to have taken place, in relation to a purported breach of sale and purchase agreement. In their statement of claim, the plaintiffs prayed for (i) a declaration of the defendant's failure to deliver vacant possession; (ii) a declaration that vacant possession be delivered

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I

forthwith; (iii) the defendant was to issue notice to deliver vacant possession within 30 days; and (iv) the defendant to pay damages to the plaintiffs to be assessed and to be paid forthwith. The plaintiffs opted not to give evidence on oath. In opposing the reliefs sought by the plaintiffs, the defendant submitted that (i) the house had been completed and the vacant possession of the house had been delivered/deemed to be delivered on 2 March 2016; and (ii) the plaintiffs were already informed that they could collect their keys but they refused to do so as there were defects to the house. The defendant further submitted that the plaintiffs failed to show why the declarations were necessary or how anything meaningful could be achieved by the grant of such declarations sought by the plaintiffs.

Held (dismissing claim):

(1) The plaintiffs took no action that was available to them to either sue the defendant for late delivery or exercise their right to terminate or repudiate the SPA based on the breach by the defendant in failing to deliver the housing accommodation within the delivery of vacant possession period as stipulated under the impugned SPA. The plaintiffs also failed to take any kind of legal action during the project abandonment period. In the circumstances, during these period the plaintiffs appeared to have sat on their rights as accorded by law. (para 22)

(2) Parties are bound by their pleadings and cannot ask for what was not pleaded. In their statement of claim, the plaintiffs elected to seek general damages but there was no evidence that the plaintiffs have in fact terminated or repudiated the impugned SPA. They have elected to treat the SPA as subsisting but erroneously claimed for general damages which, in the circumstances, would not be allowed since the statutory remedy has already been embedded into the standardised SPA. The plaintiffs did not pray for liquidated agreed damages but instead prayed for a declaration for late delivery of vacant possession. (paras 27-28)

(3) The plaintiffs did not offer explanation of any kind when they decided to file a civil suit against the defendant approximately nine years from the date of the delivery of vacant possession was supposed to take place. By the time this case was heard, the supervising architect had already issued the required certificate of completion and compliance ('CCC') based on the second approved building plan by the local authorities which had to be submitted for approval before resumption of construction works in rehabilitating and reviving the abandoned project could recommence by the third party. (para 23)

(4) The plaintiffs relied mainly on the bundles of document. On the issue of admissibility of documents, it is the duty of the plaintiffs to prove their case conclusively to tip the balance of probability in their favour. To establish their case, the plaintiffs must directly adduce the evidence

to be admitted so that they could be cross-examined. The failure by the plaintiffs rendered the documents inadmissible and the plaintiffs were not allowed to refer to them. Since the contents were not proven, the documents had zero probative value. Furthermore, by electing to not take the stand to give evidence, the plaintiffs failed to provide direct evidence to substantiate the damage and/or losses that they have suffered. In such circumstances, s. 114(g) of the Evidence Act 1950 could be invoked to draw adverse inference against them. (paras 29 & 38)

(5) The law, as it stands, does not entitle any aggrieved purchaser to refuse or reject delivery of vacant possession promised on the discovery of defects. The prayer for the defendant to issue the notice for vacant possession did not arise since the same had already been done by the defendant. There arose no necessity for the declarations sought when those matters were already not in dispute. There were no issues for determination since those issues had been superseded by the issuance and delivery of the CCC and certificate of fitness for occupation respectively to the plaintiffs, as well as the attempted delivery of vacant possession by the defendant which would have happened but for the plaintiffs unreasonable refusal to accept the keys to the house in which case, the defendant could not be faulted. (paras 32 & 37)

Case(s) referred to:

Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Chua Eng Hong & Anor v. Palm Springs Development Sdn Bhd [2001] 6 CLJ 298 HC ***(refd)***

Chung May Yen v. Puncakdana Development Sdn Bhd [2003] 5 CLJ 12 HC ***(refd)***

CIMB Bank Bhd v. Ng Lee Lian & Anor And Another Case [2011] 10 CLJ 116 HC ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 FC ***(refd)***

Dato' Raja Ideris Raja Ahmad & Ors v. Teng Chang Khim & Ors [2012] 2 CLJ 288 CA ***(refd)***

Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Hj Hussein v. Datuk Hj Mohamed [1983] 2 MLJ 227 ***(refd)***

Kredin Sdn Bhd v. YTF Investments Sdn Bhd [1998] 1 CLJ 205 CA ***(refd)***

Lai Kee Peng v. Tay Hup Lian [2016] 4 CLJ 1 FC ***(refd)***

Lee Hock Mee v. Pengarah Pengangkutan Jalan Negeri Perak & Ors [2000] 1 CLJ 584 HC ***(refd)***

Lim Cho Hock v. Government Of The State Of Perak, Menteri Besar, State Of Perak And President, Municipality Of Ipoh [1980] 1 LNS 43 HC ***(refd)***

Lim Mewah Development Sdn Bhd v. Dr Jasbir Singh Harbhajan Singh [1993] 1 LNS 154 HC ***(refd)***

Metzger v. Department Of Health And Social Security [1978] 1 WLR 1046 ***(refd)***

Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor [2008] 10 CLJ 491 HC ***(refd)***

Salijah Ab Latef v. Mohd Irwan Abdullah [1996] 2 SLR 201 ***(refd)***

South East Asia Bricksworks Sdn Bhd v. Maria Antonette [1974] 1 LNS 158 HC ***(refd)***

Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Thai [1988] 1 LNS 74 HC ***(refd)***
Tan Keat Seng Kitson v. Kerajaan Malaysia [1996] 2 CLJ 722 HC ***(refd)***
Tang Kam Thai & Ors v. Langkah Cergas Sdn Bhd & Ors [2005] 7 CLJ 86 HC ***(refd)***
Teh Guan Teik v. Inspector General Of Police & Anor [1998] 3 CLJ 153 FC ***(refd)***
The Attorney General of Hongkong v. Zauyah Wan Chik & Ors And Another Appeal [1995] 3 CLJ 35 CA ***(refd)***
Xavier Kang Yoon Mook v. Insun Development Sdn Bhd [1995] 2 CLJ 471 HC ***(refd)***
Yap Choo Hoo v. Tahir Yasin & Anor [1967] 1 LNS 212 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1A), (1B), Schedule G, Schedule H, Schedule J
Rules of Court 2012, O. 15 r. 16
Specific Relief Act 1950, ss. 40, 41

For the plaintiffs - Amarjeet Singh; M/s Zubeda & Amarjeet
For the defendant - Nor Azean Lee Abdullah; M/s Khong & Son

Reported by Najib Tamby

JUDGMENT

Hayatul Akmal Abdul Aziz JC:

Introduction

[1] This writ is in relation to a purported breach of a sale and purchase agreement dated 28 May 2004 ("the said SPA") for the sale of a piece of land with a house erected thereon known as Pajakan Negeri No. Hakmilik 264145 Lot 313710 Mukim Sungai Terap Daerah Kinta di Negeri Perak (before this, known as H.S(D)133744 PT No. 30739) ("the said house").

[2] Briefly, the plaintiffs filed a writ of summons (encl. 1) and statement of claim (encl. 2) against the defendant. In their statement of claim the plaintiffs were praying for the following reliefs:

(a) A declaration of the defendant's failure to deliver vacant possession;

(b) A declaration that vacant possession be delivered forthwith;

(c) The defendant is to issue notice to deliver vacant possession within 30 days of this order by the High Court;

(d) The defendant to pay damages to the plaintiff which is to be assessed and to be paid forthwith;

(e) Interests; and

(f) Cost.

[3] The full hearing of this matter was held on 5 and 6 September 2016 respectively, with the list of witnesses as follows:

(a) The plaintiffs opted not to give evidence on oath and had instead called three other witnesses:

(i) Encik Shaari bin Jamaludin (SP1), architect of the defendant who is also the supervising architect in this case, at the time [the principal submitting person - ("the PSP")];

(ii) Puan Amiziana bt Mohd Radi (SP2), Penolong Pegawai Seni Bina Jabatan, Majlis Daerah Batu Gajah; and

(iii) Puan Noraniza bt Ayob (SP2), TNB Executive.

(b) The defendant had called two witnesses:

(i) Mr Leong Ken Min (SD1), the defendant's director; and

(iii) Mr Chin Yin Foong (SD2), Director of KPM Development Sdn Bhd ("the white knight")

[4] The evidence from the parties have been duly recorded and upon perusing all the evidence, relevant cause papers and the respective written submissions by learned counsel, on 27 October 2016 this court finds the plaintiffs had failed to prove its case on balance of probabilities and therefore this court dismisses the plaintiffs' claim against the defendant. Dissatisfied with the above decision, the plaintiffs are now appealing against the said decision.

The Law (Housing Industry) And Its Significant Changes

[5] I find that the facts of this case and the way the plaintiffs have proceeded with this writ is peculiar to say the least and hence before I proceed with the facts of this case, I will briefly peruse the development of the law relating to the housing industry and its application to this case.

[6] This is a transaction governed under the Housing Development (Control and Licensing) Act 1966 (Act 118) and its corresponding Rules and Regulations which was tailored to protect the interest of the purchasers pursuant to the 2007 amendment (Act A1289) of the said legislation.

[7] Before this court elaborates further on this issue, it is good to briefly peruse the development of the law governing the housing industry. I refer to the book titled "*Malaysian Law on Housing Development*" (4th edition) by Salleh Buang, Thomson Sweet & Maxwell Asia, where the writer stated, the Housing Development (Control and Licensing) Act 1966 ("the principal Act") was renamed the Housing Development Act under the 2002 Amendment Act (Act A1142), is not a comprehensive law governing the housing industry. It was passed by Parliament with three objectives:

(i) to check abuses of the then infant housing industry;

(ii) to regulate activities of housing developers; and

(iii) up to a limited point to protect house buyers.

Apart from the principal Act, the housing legislation in Peninsular Malaysia is contained in two important regulations, namely the Housing Development (Control and Licensing) Regulations 1989 and the Housing Development (Housing Development Account) Regulations 1991. The writer further stated that the main objective of the law, as had been judicially recognised and enunciated in several cases is to protect the interest of the purchasers and finally in 2007, Parliament took cue from the Judiciary when under Act A1289 the important words "the protection of the interest of the purchasers" were added to the long title of the Act. Pursuant to reg. 11 of the Housing Development (Control and Licensing) Regulations 1989, it is mandatory to use the standard sale and purchase agreement as can be found in either Schedule G (sale of land with housing accommodation erected thereon) or Schedule H (sale of housing accommodation in a sub-divided building/ strata). No parties can contract out of this standardised agreement. However sub-reg. 11(1A) states to the effect that parties can depart from the standardised contract either in Schedule G or H if at the time of the execution of the said contract the building is built and the certificate of fitness for occupation ("CF/CFO") had been issued and a certified true copy thereof had been extended to the purchaser. This was intended by the Government to encourage the developers to implement the "build then sell" system ("BTS"). This was further modified in the 2007 amendment, sub-reg. (1A) was then replaced with a new provision to further push for the BTS that introduced the sale and purchase agreement under Schedule J for built then sell housing accommodation. Pursuant to this an additional sub-regulation was introduced in the form of sub-reg. (1B) that provides that sub-regs. (1) and (1A) shall not apply if at the time of the execution of the contract the certificate of completion and compliance ("CCC") has been issued by the principal submitting person ("the PSP") who is either a professional architect, professional engineer or a registered building draughtsman and a certified true copy has been forwarded to the purchaser. The old CF system issued by the local authorities was fraught with endless problem resulting in unreasonable delays which had caused significant hardship to all parties concerned. With the coming into effect on 12 April 2007 of the CCC (replacing the CF issued by the local authority), it was intended to cut down on bureaucratic red tape of the local authorities enabling house buyers to move in quickly without sacrificing their safety. CCC can only be issued for projects which have obtained their building plans approval after 12 April 2007 (prior to this date CF would still apply). This is because, under the CCC system, a responsibility process matrix was introduced which would necessarily mean that it had to apply post 12 April 2007 and not before. Before the PSP can issue the CCC, he must ensure that all construction and related works have been completed in accordance to the approved building plans and that he has supervised the works accordingly. The PSP before

issuing the CCC must secure the required confirmation on compliance from Tenaga Nasional Berhad, Water Authorities, Sewerage Services Department, Department of Occupational Safety and Health, Bomba and Roads and Drainage Department.

[8] Therefore, as can be seen from the above, significant changes occurred in the housing development industry in the year 2007. In pushing for the BTS, the issue of CF and the introduction of the CCC was made. In *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Thai* [1988] 1 LNS 74; [1988] 3 MLJ 221, it was held that the CF is distinct and separate from the issue of vacant possession. In *South East Asia Bricksworks Sdn Bhd v. Maria Antonette* [1974] 1 LNS 158; [1979] 2 MLJ 46, Abdul Hamid J succinctly pointed out that "completion" does not mean that the developer must have obtained CF for occupation of the building. To hold otherwise, says the learned judge would be to "import a term which was not within the contemplation of the parties and would have the effect of frustrating the contract".

[9] The foregoing will be most relevant as we examine the facts of the present case and the resulting disputes besieging it between the parties that had led us to this impasse. In our present case, we are looking at the SPA under Schedule G. It must be mentioned that the housing development project in the present case ("the said project") is a rehabilitated abandoned housing project (projek perumahan terbengkalai) with the involvement of a third party, KPM Development Sdn Bhd ("the white knight") after securing the approval of the Ministry of Housing and Local Authorities. The said white knight had assisted to complete the said project after approximately a period of nine years from the time that it had started in 2004.

Brief Facts

[10] It is not a matter of dispute that the defendant in this case had failed to deliver vacant possession of the said house within 24 months as required in the said SPA.

[11] The said house is a show house or a model house already erected on the said land thereon. It has extra land (more than 10,000 sq feet), with better furnishings such as better quality tiles, landscaped garden, tiled driveway and apron, of which the plaintiffs had paid extra for it.

[12] The evidence of SD1 affirmed and that it is not disputed that the housing project had stopped for several years and could be regarded as an abandoned project as the defendant ran out of financial resources brought about by cost escalation and re-designing of the development planning layout. In any case, even if the defendant as a developer can show reasons for the delay, that cannot as a matter of law, provide it with a way out. It has been held that the developer should have applied to the controller of

housing for an extension of the completion date (see *Chua Eng Hong & Anor v. Palm Springs Development Sdn Bhd* [2001] 6 CLJ 298; *Chung May Yen v. Puncakdana Development Sdn Bhd* [2003] 5 CLJ 12; *Tang Kam Thai & Ors v. Langkah Cergas Sdn Bhd & Ors* [2005] 7 CLJ 86; [2006] 1 AMR 731).

[13] The evidence of SD2 affirmed and it is not disputed that the said project was revived with the intervention of the white knight approved by the Ministry of Housing and Local Government.

[14] Parties had filed issues to be tried and marked as F. However, I find that the issues are overlapping and repetitious and hence I will discuss the issues as set out below.

(i) Whether the plaintiffs have the right to seek a declaration that the defendant had failed to deliver vacant possession within 24 months; and

(ii) Whether by the defendant's admission at the time of the filing of this action on 29 October 2015 render this action to be pre-matured.

I will discuss both issues together since I am of the opinion that the issues are inter-related and it is better explained simultaneously.

Submission By The Plaintiffs

[15] Learned counsel for the plaintiffs submitted that it is an admitted fact that the defendant was required to complete the construction of the said house to the extent agreed and to be delivered to the plaintiffs within 24 months from the date of the sale and purchase agreement (28 May 2004) which was on or before 28 May 2006. It is also admitted that the defendant failed to deliver vacant possession of the said house within the required 24 months' period and that as the date of filing of this action on 29 October 2015, the defendant had not delivered vacant possession of the said house to the plaintiffs. The defendant's failure to deliver vacant possession of the said house in the terms agreed has therefore, been proven. This means the plaintiffs are entitled to the reliefs sought in this action against the defendant based on the cause of action pleaded by the plaintiffs in this action.

[16] Learned counsel further submitted that the defendant having admitted in the amended defence that the plaintiffs being the registered owners of the said house have been denied delivery of vacant possession of the said house in the terms agreed, with passage of time that has elapsed showing a prolonged period of delay of more than nine years and continuing, will obviously entitle the plaintiffs to be given the declaratory reliefs sought by them in this action.

[17] The plaintiffs contended that they are also entitled to be given the relief as sought in para. 10(3) of the statement of claim. The relief is for an order that the defendant gives to the plaintiffs a notice of delivery of vacant possession of the said house within 30 days from the date of the judgment to be given in this action. This court should grant this relief as the totality of the evidence before this court clearly justifies this court granting the relief

for the defendant to deliver vacant possession in the terms agreed. The defendant is in a position to perform this obligation and there is evidence to support the same. The plaintiffs' witnesses gave evidence which purports to confirm that there was the said period of in-action in respect of the housing project but however, resumption of construction work had begun after this action was filed.

Submission By The Defendant

[18] Learned counsel for the defendant submitted that the evidence clearly shows that the said house had been completed. The witnesses called by the plaintiffs (SP1, SP2 and SP3) confirmed the said house had been completed, *albeit* with defects. The CCC and CFO had been issued, and served on the plaintiffs and/or their solicitors on 2 March 2016. It is thus the defendant's stand that the vacant possession of the said house had been delivered/deemed delivered on 2 March 2016. The plaintiffs have failed to show why these declarations being sought are necessary, or how anything meaningful could be achieved, by the grant of such declarations considering the above.

[19] After all, there would be nothing to be enforced even if the court were to grant the declarations sought. A declaratory judgment is a formal statement by a court pronouncing upon the existence of or non-existence of a legal position of a subject matter. Its pronouncement is predicated upon a legal relationship, but in this case, it is in the absence of any semblance of an order which can be enforced against the defendant (*Lai Kee Peng v. Tay Hup Lian* [2016] 4 CLJ 1; [2016] 3 MLRA 94 @ p. 101).

[20] Vacant possession has been substantially complied with. The plaintiffs' witnesses SP1 and SP2 both confirmed that the house had been completed and vacant possession can be delivered. The defendant had already served copies of both the CCC and CFO upon the plaintiffs and/or their solicitor.

Findings Of This Court

[21] It is to be noted that the plaintiffs' claim in this case is not based on seeking liquidated damages as provided for under the SPA dated 28 May 2004 as governed under the housing developers' legislation for late delivery of vacant possession, but instead as admitted by the plaintiffs' counsel's submission, it is to seek a declaration that the defendant had failed to deliver vacant possession within 24 months of the signing of the said SPA.

[22] I observed that from the facts of this case, it is not in dispute that the plaintiffs took no action that was available to them to either sue the defendant for late delivery or exercise their right to terminate or repudiate the said SPA based on the breach by the defendant in failing to deliver the housing accommodation within the delivery of vacant possession period as stipulated under the impugned SPA (24 months, until May 2006). The plaintiff also

failed to take any kind of legal action during the project abandonment (dalam tempoh masa projek terbengkalai) period. I am of the opinion that in the circumstances, during these period the plaintiffs appeared to have sat on their rights as accorded by law.

[23] When the plaintiffs decided to file a civil suit against the defendant it was on 29 October 2015 (approximately nine years from the date of the delivery of vacant possession was to have taken place, ie, May 2006), no explanation of any kind has been offered in this regard by the plaintiffs. By the time this case was heard before the High Court on 5 and 6 September 2016, the PSP (SP1), the supervising architect at the time had already issued the required CCC dated 28 December 2015 based on the second approved building plan by the local authorities in 2015 which had to be submitted for approval before resumption of construction works in rehabilitating and reviving the abandoned project could recommence by the said white knight.

[24] SP1 in his evidence stated that the original building plan approval was in 2004 in which the CF system applies. Since the second approval of the building plan came in after the date the CCC system came into effect, the project could therefore also come under the CCC system and CCC was in fact issued. SP1 affirmed that before the CCC can be issued, all construction and related works must be completed in accordance to the approved building plans and that he has supervised the works accordingly. SP2 in her evidence stated that, the local authority (Majlis Daerah) had also issued the CF on 22 January 2016 in respect of the same project. SD1 in his evidence stated that the plaintiffs were duly informed of the CF and the CCC respectively, and on 2 March 2016, were duly advised to collect their keys but the plaintiffs have till to this date refuses to do so. Notwithstanding the plaintiffs' refusal to accept delivery of the keys to the said house till to date, it is interesting to note that the evidence from the plaintiffs' witness (SP3) from Tenaga Nasional Berhad (TNB) would show that the plaintiffs' unknown to the defendant had applied for and obtained electricity supply to the said house since 23 July 2014 which goes to show that the said house was at that time ready to be connected with electricity and the fact that the connection was in fact made by TNB would also suggest that the required deposit had in fact been made by the plaintiffs. However, since the plaintiffs had elected not to take the stand to give evidence, no plausible explanation could be secured to clarify this issue. This evidence would also show that it was approximately 14 months thereafter, that is 29 October 2015 that this civil suit was filed. One month and three weeks thereafter the CCC dated 28 December 2015 was issued certifying the said house had been completed followed by the CF on 22 January 2016 in which the plaintiffs were duly informed. The defendant had also issued letter of 2 March 2016 informing the plaintiffs to collect the keys to the said house. I am of the opinion that clearly the issue on vacant possession was resolved well before the trial of this action.

[25] I opined that, in matters relating to the legal position on an SPA governed under the Housing Development (Control and Licensing) Act 1966 and its corresponding Rules and Regulations, it is settled that in the event of default by the developer under the SPA, the innocent purchaser has the legal rights to either treat the SPA as repudiated and suing for damages or to treat it as still subsisting and sue for liquidated damages for late delivery as formularised in the SPA (see *Xavier Kang Yoon Mook v. Insun Development Sdn Bhd* [1995] 2 CLJ 471; [1995] 1 AMR 667).

[26] It is clear from the facts adduced in the present case that even though there had been a lapse of over nine years from the time that delivery of vacant possession was supposed to have taken place (May 2006) the plaintiffs had not elected to repudiate or terminate the SPA and sue the defendant for damages as they are rightly entitled to. The plaintiffs contend that remedial works had not been performed by the defendant to rectify defects in the said house and therefore vacant possession cannot take place. The defendant on the other hand informed the court that they are unable to carry out remedial works since the plaintiffs' solicitor had issued warning letters not to disturb the said house.

[27] However, in the present case, the plaintiffs had elected to seek general damages as in prayer 10(4) of their statement of claim. Again, I wish to reiterate that nowhere is to be found any evidence before this court that the plaintiffs have in fact terminated or repudiated the impugned SPA. What could be rightly deduced from their conduct is that they have elected to treat the SPA as subsisting but erroneously claiming for general damages which in the circumstances would not be allowed since the statutory remedy has already been embedded into the standardised SPA.

[28] In *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 CLJ 131; [1984] CLJ (Rep) 77, Mohamed Azmi FJ held that the terms and conditions under the Housing Development (Control and Licensing) Rules 1970 must be read into the agreement "as if they were part and parcel of what the parties have bargained for." the learned judge further held that any attempt by any party (especially the developer) to "contract out of the Act" is clearly an "open defiance of the Housing Developers legislation". In this case, I am of the opinion that the said SPA had already formularised a statutory mechanism for the computation of liquidated agreed damages for late delivery and that must be adhered to and any attempt by any party not to comply can be considered as an open defiance of the housing developers legislation. I find, in the present case, the plaintiffs did not pray for liquidated agreed damages for late delivery but instead prayed for a declaration for late delivery of vacant possession (which presently is not a "living issue"). The law as it stands is clear, parties are bound by their pleadings and cannot ask for what is not pleaded. Richard Talalla J in *Lim Mewah Development Sdn Bhd v. Dr Jasbir Singh Harbhajan Singh* [1993] 1 LNS 154; [1993] 2 AMR 1263, was explicit in his judgment that in view

of the remedy provided under the Act, the purchaser cannot recover anything further or beyond it. I agree with the submission of learned counsel for the defendant that the plaintiffs by electing not to take the stand to give evidence have failed to provide direct evidence to substantiate the damage and/or losses that they have suffered (see *CIMB Bank Bhd v. Ng Lee Lian & Anor And Another Case* [2011] 10 CLJ 116).

[29] Both plaintiffs for reasons best known to them elected not to take the stand to prove their case and relied mainly on the bundles of document. In such circumstances, s. 114(g) of the Evidence Act 1950 could be invoked to draw adverse inferences against them.

[30] The plaintiffs had also elected to seek declaratory reliefs in the form of prayer 10(1) and 10(2) in the statement of claim with no consequential relief being sought. They prayed for the court to declare that the defendant is in default of delivering vacant possession in accordance to the SPA and the plaintiffs are entitled to vacant possession forthwith. The facts would clearly show that the issue of default in delivery of vacant possession is not in dispute and therefore there arises no necessity to determine the issue by a declaration.

[31] The same could also be said with the issue of the right to have immediate vacant possession since the plaintiffs themselves have refused to accept vacant possession. The plaintiffs were duly informed of the CF and the CCC respectively, and on 2 March 2016, they were duly advised to collect their keys but the plaintiffs hitherto, refuses to do so. I agree with the submission of learned counsel of the defendant that remedial work to rectify defects to the house would be addressed under the heading "defects" in the SPA.

[32] The law as it stands, does not entitle any aggrieved purchaser to refuse or reject delivery of vacant possession premised on the discovery of defects. The plaintiffs contend that remedial works had not been performed by the defendant to rectify defects discovered in the said housing accommodation and therefore vacant possession cannot take place. The defendant on the other hand informed the court that they are unable to carry out remedial works since the plaintiffs' solicitor had issued warning letters not to disturb the said house. I hold in the circumstances that the argument by the learned solicitor for the plaintiffs cannot hold. Therefore, I hold that prayer 10(3) for the defendant to issue the notice for vacant possession do not arise since the same had already been done by the defendant.

[33] The law on declaratory relief is settled that in the case of a declaratory judgment, O. 15 r. 16 of the RC 2012 provides that no action or other proceeding shall be open to objection merely because a declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether consequential relief is or could be claimed. In Malaysia, it is recognised that the courts have jurisdiction to grant declarations under the inherent jurisdiction of the court and the Specific Relief Act 1950 (Act 137),

ss. 40, 41 in *The Attorney General of Hongkong v. Zauyah Wan Chik & Ors And Another Appeal* [1995] 3 CLJ 35. The Court of Appeal following *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, SC, held that this rule is merely the procedural adjunct to the jurisdiction of the court to allow declarations under the Specific Relief Act 1950, ss. 40, 41.

[34] No doubt that the court has the jurisdiction to grant a declaration, irrespective of whether the application has a cause of action or not and even if the cause of action did not exist at the time of filing of the application. (see *Dato' Raja Ideris Raja Ahmad & Ors v. Teng Chang Khim & Ors* [2012] 2 CLJ 288; [2012] 5 MLJ 490, CA. A declaration can be sought even though no consequential relief is sought: *Teh Guan Teik v. Inspector General Of Police & Anor* [1998] 3 CLJ 153; [1998] 3 MLJ 137, FC. But it must be borne in mind that such discretion must be exercised judiciously.

[35] There should be no undue delay in applying for declaratory relief: *Kredin Sdn Bhd v. YTF Investments Sdn Bhd* [1998] 1 CLJ 205; [1998] 1 MLJ 46; *Hj Hussein v. Datuk Hj Mohamed* [1983] 2 MLJ 227 at 232. In *Salijah Ab Latef v. Mohd Irwan Abdullah* [1996] 2 SLR 201, the court held that before declaratory relief will be granted, it must be shown as follows:

(i) the court must have jurisdiction and power to award the remedy. If there is no jurisdiction, there is no power (*Lim Cho Hock v. Government Of The State Of Perak, Menteri Besar, State Of Perak And President, Municipality Of Ipoh* [1980] 1 LNS 43; [1980] 2 MLJ 148);

(ii) as the declaration is a discretionary remedy, it must be justified under the circumstances of the case;

(iii) the plaintiff must have *locus standi* to bring the action;

(iv) there must exist a real controversy for the court to resolve (see *Tan Keat Seng Kitson v. Kerajaan Malaysia* [1996] 2 CLJ 722; [1996] 1 MLJ 454);

(v) the person whose interest is to be affected should be before the court (*Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417); and

(vi) a declaration can only be made after a proper argument and cannot be made merely on admissions by the parties whether in pleadings or otherwise (*Metzger v. Department Of Health And Social Security* [1978] 1 WLR 1046; [1978] 3 All ER 753].

[36] Now in applying the foregoing legal position, in particular the position on the delay in making the application which had not been explained by the plaintiffs. No sufficient justification in the circumstances as to why the said declaratory reliefs are sought by the plaintiffs. A declaration cannot be made merely on admissions by the parties in the pleadings or otherwise. The fact

that both plaintiffs failed to give evidence to substantiate and justify their prayer 10(1) and prayer 10(2) above, I find the issue of failure to deliver vacant possession that is not in dispute for the court to make a determination. I hereby dismiss the said prayers 10(1) and 10(2) for declaratory reliefs.

[37] I agree with learned counsel for the defendant that in the circumstances of the case, the "living issue" principle applies. There arises no necessity for the declarations sought when those matters are already not in dispute. There are no issues for determination since those issues had been superseded by the issuance and delivery of the CCC and CF respectively to the plaintiffs, as well as the attempted delivery of vacant possession by the defendant which would have happened but for the plaintiffs' unreasonable refusal to accept the keys to the said house in which case in the circumstances the defendant could not be faulted (see *Lee Hock Mee v. Pengarah Jabatan Pengangkutan Jalan Negeri Perak & Ors* [2000] 1 CLJ 584; [2000] 1 MLJ 723).

Conclusion

[38] As I have mentioned above, the plaintiffs in this case were not called to give evidence during trial. I find that on the issue of the admissibility of documents, it is trite that it is the duty of the plaintiffs to prove their case conclusively to tip the balance of probability in their favour. To establish their case, the plaintiffs in the present suit must directly adduce the evidence to be admitted so that they could be cross-examined on them. Consequently, I hold that the failure by the plaintiffs in this regard would render the documents inadmissible and the plaintiffs are not allowed to refer to it. The law of evidence is clear in that since the contents has not been proven, it has zero probative value (see *Yap Choo Hoo v. Tahir Yasin & Anor* [1967] 1 LNS 212; [1970] 2 MLJ 138; *Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor* [2008] 10 CLJ 491).

[39] Considering the foregoing and in the upshot, I hereby dismiss the plaintiffs' case with cost of RM15,000 to the defendant and allocator fees to be paid.